

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 849 of 1989

with

CRIMINAL APPEAL NO. 77 OF 1990.

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA and Sd/-  
MISS JUSTICE R.M.DOSHIT Sd/-

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes @@

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy  
of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil No  
Judge?

NATUBHAT BHUDARBHAT

## Versus

**STATE OF GUJARAT**

Appearance:

1. Criminal Appeal No. 849 of 1989

MR KR RAVAL for appellants(accused)

Mr. P.G.Desai, PP, Ms. Amy Yagnik, APP and Mr. PB Bhatt, APP for the State of Gujarat.

2. Criminal Appeal No. 77 of 1990

Mr. PB Bhatt, APP for the State of Gujarat.

Mr. KR Raval for the respondents-accused.

CORAM : MR.JUSTICE M.R.CALLA and  
MISS JUSTICE R.M.DOSHIT

Date of decision: 23/03/98

These two criminal appeals are directed against the judgment and order dated 22nd November, 1989 passed by the learned Additional Sessions Judge, Surendranagar in Sessions Case No. 61 of 1988 whereby the learned Additional Sessions Judge has convicted accused No. 3 Natubhai Bhudarbhai for the offence under section 302 of the Indian Penal Code as also under section 25(1)(c) of the Arms Act and section 135 of the Bombay Police Act and he has been sentenced to undergo life imprisonment and fine of Rs. 10,000/- and in default, to undergo further imprisonment for a period of three years. Out of this amount of Rs.10,000/-, a sum of Rs.5,000/- is ordered to be paid to the widow or the eldest child of the deceased Talsi Gangaram. The appellant Natubhai Bhudarbhai has been sentenced to undergo rigorous imprisonment for a period of three months for the offence under section 25(1)(c) of the Arms Act and section 135 of the Bombay Police Act. All the sentences have been ordered to run concurrent. The learned Sessions Judge has also convicted the accused Bhudarbhai Mohanbhai under section 25(1)(c) of the Arms Act and section 135 of the Bombay Police Act and he has been sentenced to undergo one month's rigorous imprisonment. It has also been ordered that the accused who were in jail since 19th May, 1988 shall be given benefit of the period for which they have remained in jail during the course of the trial. By the very same order dated 22nd November, 1989, other accused persons namely Bhupat, Ishwar, Raghunath and Raghu Manu have been acquitted.

2. The appeal against conviction has been preferred by Natubhai Bhudarbhai i.e. Criminal Appeal No. 849 of 1989 and the State of Gujarat has preferred appeal against the order of conviction of Bhudarbhai Mohanbhai for the offence under section 302 read with section 34 and section 114 if the Indian Penal Code i.e. criminal appeal No. 77 of 1990. There is no appeal against the acquittal of the other accused persons. Whereas both these criminal appeals arise from the same incident and the same impugned judgment and order passed by the learned Additional Sessions Judge in Sessions Case No. 61 of 1988, both these appeals are decided by this common judgment and order. It may also be pointed out that a criminal revision application no. 7 of 1990 had also been preferred by the complainant Mahadevbhai Laljibhai against the accused Bhudarbhai Mohanbhai, Bhupat Bhudarbhai and Ishwar Raghunath and Laghu Manu and on

29th January, 1995, it was ordered by the Division Bench of this Court that this Criminal Revision Application No. 7 of 1990 may be placed on Board for final hearing alongwith these two criminal appeals but, from the record, we find that on criminal revision application No. 7 of 1990, the Division Bench had already passed an order on 25th April, 1990 that No order in view of the order passed in the appeal filed by the State and, therefore, nothing more is required to be done on this revision application. Although, Mr. H.D.Vasavada had appeared on behalf of the original complainant and in view of this Court's order dated 25th April, 1990, revision application is treated as disposed of.

3. The case arises out of an incident dated 17th May, 1988 which took place near village Devcharadi of Dhrangadhra Taluka, District Surendranagar Police Station Dhrangadhra. With regard to this incident which took place at 6.30 p.m. on 17th May, 1988, the complainant Mahadev Valjibhai filed FIR at Police Station, Dhrangadhra on the same day at about 10.00 p.m. alleging that he was coming from his farm on that day and Talshi Gangaram had gone to receive his son who had gone with the cattle at the cattle camp to Prangadh. At that time, Natubhai Bhudarbhai and Bhupat Bhudar of village Devcharadi came from the road side and Bhudar Mohan and Ishwar Raghunath came from the side of the village tank. Bhupatbhai Mohanbhai was having gun which he passed on to Natubhai Bhudarbhai who fired the gun in the chest of Talsi Gangaram and he fell down. It was further alleged that this complainant Mahadevbhai Valajibhai then came to his house and told his father Valjibhai and, thereafer, Mahadev and his father both came to the spot and found that Talsi Gangaram had already died and above named four accused persons had fled away. Thereupon, they went to Sitapur to file the complaint and, thereafter, to Dhrangadhra Police Station where the complaint was filed in which it was alleged that the reason for committing the murder of his Dada (uncle) Talshi Gangaram was that the accused Natubhai Bhudarbhai had some quarrel with the son of the deceased before about 8 months back in Navratri about which no police complaint had been filed. It was also alleged that at the time of incident, Talsi Gangaram's son Narsi Talsi and one Bhikha Lala were present. On the basis of this complaint, criminal case was registered at the Police Station, Dhrangadhra. The Investigating Officer went to village Devcharadi on the spot where the dead body of deceased Talsi Gangaram was lying. Inquest report was prepared. Dead body of the deceased Talsi Gangaram was identified by his son

Khodabhai and the pellets found on the body of the deceased were taken in possession and the dead body was sent for post mortum examination at Dhrangadhra Hospital. In the morning of 18th May, 1988 between 7.00 and 8.00 a.m., panchanama of the scene of offence was prepared and the sample of blood soaked soil was taken and the respective panchanamas were prepared. It was found that there was distance of about 25 to 30 ft. between two places where the blood soaked soil was there and the spot is on the way between Devcharadi and Prangadh near the village tank wherefrom the village is about half a furlong or a furlong. After preparing the panchanama of the scene of occurrence, statements of Narsi Talsi, Shankar Pala, Bhikha Lalji, Valji Gangaram were recorded. Narottam alias Narsi's blood stained clothes were taken into custody and its panchanama was prepared on 19th May, 1988. The statement of Khodabhai Talsi was recorded and Bhudar Mohan was arrested. On the same day, on information being received that rest of the accused persons were near Umai River, the IO went to the place near Umai River wherefrom Natubhai Bhudarbhai, Bhupatbhai Bhudarbhai were arrested in presence of the panchas and at that time, Natubhai Bhudarbhai was having the gun which was also recovered and the panchanama was prepared. This place is about 3.00 km away from village Devcharadi. The gun was wrapped in cloth cover and it was sealed and the licence was demanded from the accused persons but they were not having the licence. On 20th May, 1988, Ishwarbhai Raghunathbhai was arrested. Remand in respect of the accused persons till 24th May, 1988 was granted and after inquiring from them, Laghu was arrested and he too had no licenced gun. On 23rd May, 1988, the house of the accused No. 1, 2 and 3 was searched in presence of the panchas. Natubhai Bhudarbhai gave pellets which were taken in the possession and the accused persons were produced before the Court on 24th May, 1988. The clothes of the accused persons and the other articles were sent to the Forensic Science Laboratory at Junagadh and after completing the investigation, chargesheet was filed on 1.8.1988. Thereupon, charge was framed against the accused persons Bhudarbhai Mohanbhai, Bhupatbhai Bhudarbhai, Natubhai Bhudarbhai, Ishwarbhai Raghunath and Ladhu Manu under section 302 of the Indian Penal Code. Accused No.1 Bhudarbhai Mohanbhai was also charged for the offence under section 109 of the Indian Penal Code and accused No. 1 and 3 were also charged for the offence under section 25(1)(c) of the Arms Act and section 135 of the Bombay Police Act.

Judge has convicted, sentenced and acquitted the accused persons as stated above. Natubhai Mohanbhai has preferred criminal appeal no. 849 of 1989 against the conviction and sentence recorded by the learned Sessions Judge, Surendranagar on 22nd November, 1989 and the State of Gujarat has preferred criminal appeal no. 77 of 1990 against the order of acquittal of Bhudarbhai Mohanbhai. The complainant Mahadevbhai Valjibhai is the nephew of the deceased Talsi Gangaram. Narottam alias Narsi is the son of the victim Talsi Gangaram and the accused Natubhai Bhudarbhai and Bhudarbhai Mohanbhai are son and father.

5. Mr. Raval, the learned counsel for the appellant-accused has referred to the statements of four eye witnesses namely PW-1 Mahadevbhai Valjibhai, PW-2 Narottambhai alias Narsibhai Talsi; PW-3 Shankarbhai Palabhai and PW-4 Bhikhabhai Laljibhai. He has submitted that the version of these witnesses is not at all trustworthy. It does not inspire confidence and their conduct after the incident is not at all natural. While referring to the statement of PW-1 Exh. 11, Mahadevbhai Valjibhai at page 61 of the Paper Book and while referring to the contents of the FIR Exh. 25 at page 123, it has been pointed out that the name of Shankar Pala had not been mentioned by Mahadevbhai Valjibhai in the FIR. According to the learned counsel, this witness was at the distance of 62 ft. and the version given by the other eye witness has also been questioned by the learned counsel by saying that their conduct is not natural and their version cannot be believed. He has also assailed the recovery of the gun and stated that the story of the prosecution cannot be believed. He has referred to the statement of two defence witnesses who were examined in support of the plea of alibi on behalf of Natubhai Bhudarbhai and it has been submitted that on the date of incident, he was not present on the spot but was present in the Court at Dhrangadhra for trial in a criminal case against him under the Prohibition Act and he came back to his village Devcharadi only at about 12.00 o'clock on the night of 17th May, 1988 and after being free from the Court, he had no means to reach the village Devcharadi. The Court Clerk of the criminal court has been examined as Defence witness No.1 and the Traffic Controller has also been examined.

6. On behalf of the prosecution, it has been argued that all the four eye witnesses have categorically stated that Bhudar Mohan had passed on the gun to Natubhai who fired on the deceased in the chest from the closed range

which resulted into death of Talsi Gangaram. The offence is proved by oral evidence as well as the medical evidence and the recovery of the gun. It has also been submitted that the offence has also been committed under the Arms Act and the Bombay Police Act and that there was no basis to believe the plea of alibi because the accused could have made good his reach at the scene of offence even after attending the Court.

7. We have considered the submissions made by the learned counsel for the accused and the prosecution. There is no dispute about the factual back ground that in May, 1988, the State of Gujarat was facing a drought and the villagers used to take their cattle at the cattle camp and at that time, agricultural activities could not be there. It is the story of the prosecution that on the date of incident, Narsi Talsi i.e. son of the deceased Talsi Gangaram who had gone go Prangadh with his cattle at the cattle camp did not return in time and, therefore, his father deceased Talsi Gangaram left his place towards Prangadh to see as to why his son had not come back with the cattle. Shankar Pala accompanied deceased Talsi Gangaram. The deceased met his son near the village tank and they were returning towards his village Devcharadi. The witness Mahadev was behind them. At that time, Natubhai and Bhupat came from the east and Bhudarbhai and Ishwar Raghunath came from the side of the village tank. Bhudar was carrying a gun and passed it on to Natubhai who fired it on the chest of Talsi Gangaram from the distance of about 5 to 7 ft. and Talsi Gangaram fell down and four accused persons fled away towards the east. The deceased sustained injuries on his chest, face, neck and the throat. At that time, Bhikha Lalji had also come.

8. There is no dispute that there was no immediate cause with any of the accused to commit the offence and all that has been suggested with regard to the motive is the quarrel which had taken place between Natubhai present appellant and Narsi Talsi, son of the deceased Talsi Gangaram about eight months back in Navratri. Thus, there is no immediate cause and the motive which has been suggested is quite remote and cannot be said to be sufficient in the normal course so as to take upon the commission of the offence of murder after a period of about eight months. Absence of immediate cause or any strong motive may not be decisive and in a given case, if there is clinching evidence or wholesome evidence to support the commission of the offence, mere absence of

immediate cause or strong motive may not be sufficient to discard the prosecution story and, therefore, we have examined the oral evidence in detail with regard to the commission of offence. No doubt, all the four eye witnesses have stated that the four accused persons were present on the spot, Bhudar had given gun to Natubhai who fired the gun on the chest of the deceased resulting into his death. PW-2 Mahadev had more than one opportunities at different stages to disclose the names of the assailants before filing the complaint at Dhrangadhra. From the scene of offence, leaving behind Narsi with the deceased, he went to his father Valjibhai who was at his farm which is at the outskirts of Sitapur but in the complaint, he nowhere says that he had gone to the house of the deceased to inform the wife of the deceased and to give names of the assailants. He has improved his version in his statement made before the Court that he had gone to the house of the deceased and had disclosed the names of the assailants. Thus, it is doubtful from the statement of this witness Mahadev PW 2 as to whether the names of the assailants were disclosed to the family members of the deceased or to any other person at the earliest possible opportunity while he was on way to his father after the incident had taken place and even the name of Shankar Pala as a witness to the incident who is alleged to be present at the time of commission of offence was not mentioned in the FIR and his name has been given out in the statements made before the Court. He, PW 1 has stated that he had gone to his farm and was on the way to his village from the farm when he witnessed the incident. He says that he has about 8 to 9 farms but the particulars of the farm was not given in the FIR. He also did not disclose in the FIR that he had gone to the house of the deceased to inform Pravin Khoda and the wife of the deceased with regard to the incident before going to his father at Vadi, although he admits that his house is at the back of the house of the deceased. He has also said that at the time when he left the spot, Talsi Gangaram was alive. Then, he has stated that he had gone to his farm, he also says that at that time, there was no agricultural activities and there was no work at the field. He has also disclosed that he did not raise any alarm or cry at the time when the gun was fired on Talsi Gangaram and has also stated that no such alarm was raised by Shankar Pala and he has stated that whether Shankar Pala has raised alarm or not is also not known to him. He has stated that the scene of offence is about 1/2 km away from the village and his house is at the other end of the village and while going from the scene of offence to the village, he did not disclose the incident to anybody. Although there were about 50 houses

in the way. Before entering the village, there is a place of Magha Maharaj which is at the distance of 1/2 furlong from the spot. Magha Maharaj is 60 to 70 years old and he has sons aged about 30 to 35 years and no one was called. He then says that he did not tell about the incident to anybody other than the persons of his house. He also says that when he came back with his father, then also, he did not talk about the incident and nobody asked him about the incident at the spot and there was no talk between him on one side and Pravin and Khoda on the other side.

9. From the statements of PW 2 Narottam alias Narsi Talsi, it is found that for some time, he was left alone near the body of his father and the other witnesses had left the spot. This witness was aged about 14 years at the time of incident. He then states that in the night, he went to his home and had gone to sleep and thereafter, he got up only at about 7 am on the next morning. He has stated that he left for Devcharadi from the cattle camp after the time of cattle camp was over and about 15 to 20 persons were going ahead, while he was on his way back to the village from the cattle camp. He has stated that he does not know as to how many persons were coming behind him but some persons of his village had bypassed him from behind whom he used to see in the village. While his injured father had fell down, persons coming from behind had passed from the way but he did not talk anything about it to them and they had seen his injured father but nobody had stopped nor did anybody ask him about the incident. There was no darkness by the time he left the spot for his house. He says that he went to his house at about 6.45 p.m. The villagers came after Pravin had come and he did not talk about the incident to anyone except Pravinbhai. His mother Kuvarben had come after he had left. Whether the villagers who were going ahead had come back on hearing the firing is not known to him and it is also not known to him as to whether the persons who were coming behind had come or not after the firing. He then says that he did not tell Mahadevbhai to inform about the incident to his brother at the house although he was knowing that his father had died immediately after he fell down. He says that he had kept the head of his father on his leg and, therefore, his clothes got blood stained. Mahadev stayed there for about five minutes. He says that his father did not run away and Shankar Pala did not intervene. He had seen the accused coming from a distance of about 20 ft. and at the time when he heard firing, Natubhai was at the distance of about 6 to 7 ft. He has denied the suggestion that he was not on the spot

and has also denied the suggestion that the accused Natubhai Bhudarbhai was not present on the spot. P.W.3 Shankar Pala who was in the company of the deceased when the deceased had left his house to fetch his son has also stated that after the incident, he left for his home. He had no personal work to go towards Prangadh on the date of incident. He says that he had not asked Bhikha Lalji to stay on the spot. He did not think of living with the deceased and did not consider it necessary to stay there till Mahadev returns. He did not tell Narshi that he may go to the village and that he would be standing there. He has stated that the deceased Talsi Gangaram was ahead of the cattle and he was at the side and Narsi was on his side. He has also admitted that the place of Magha Maharaj was on the way, there is temple of Mataji but nobody came after hearing the gun fire. He did not talk to any of the persons who were coming from the village side although he says that about 10 to 15 persons were coming from the side of the village. He says that he could not say anything to any of these persons although there was nothing to prevent him from saying that Natubhai Bhudarbhai had fired the gun. Bhikha Lalji PW 4 is yet another villager who had said that Shankar Pala and Mahadev were present on the spot. Shankar Pala was following him and he has said that he did not narrate the incident. He did not inform about the incident either at the house of the Valjibhai or at the house of the deceased. He did not talk anything about the incident to anybody even after going to his home.

10. Thus, the version of these four eye witnesses after the incident does not appear to be natural and it is unbelievable that in a small village like this, when a person has been killed to death by use of fire arm at the outskirts of the village and which is witnessed by as many as four eye witnesses remains undisclosed to the persons who were passing by the scene of occurrence and is also not noticed by the persons at the nearby place, nobody comes from the nearby place of Magha Maharaj where there is said to be a temple of Mataji and these witnesses did not disclose to the others in the village, and the witnesses choose simply to go home. The witnesses such as Shankar Pala and Bhikha Lalji PW 3 and PW 4 go home as if nothing had happened. Boy of 13 to 14 years of age namely Narottam alias Narsi also goes to home to sleep for the whole night. The witnesses had left the body of the deceased Talsi Gangaram who had been fired in the custody of minor child. The PW 1 does not inform even the wife of the deceased immediately after the incident while the house of the deceased and the

house of the witness No. 1's father are nearby and till witness PW 1 goes to his father at wadi and his father comes on the spot and then goes to the police station for filing the FIR, names of the assailants are not disclosed to anybody in the village and the places nearby and the FIR is lodged. Thus, there was time as also an opportunity when the names of the assailants could be disclosed by any of the eye witnesses to the villagers and it is also a matter of common experience that in a small village like this, if there is such an incident, resulting into death after firing, many people would assemble and the news would spread immediately in the whole village more particularly when it was the time of a summer evening, when most of the villagers must be available in their house and when it is also admitted by the aforesaid eye witnesses that there were persons passing by ahead and behind the scene of offence and at the time of offence.

11. So far as the medical evidence is concerned, there is no doubt that the PM Report Exh 52 of P. 231 of Paper Book shows that the death has been caused on account of shock and hemorrhage due to perforating injury to heart as a result of the gun shot. Multiple perforated injuries were present over the anterior chest wall and most of the pellets were found embedded in the subcutaneous tissue and muscles subcutaneous hemorrhage; three perforated injuries present in the anterior layer of pleura of left lung approximately 500 cc of blood present in left pleura cavity ; three perforated injuries present in the anterior wall corresponds to pleura perforations; three pellets of shot recovered from the left lung; a single perforated injury present in the exterior layer of pericardium; single perforation present in the anterior wall of left ventricle; a pellet recovered from the cavity of left ventricle. All the chambers of heart empty. 60 to 70 pellets were recovered from the body. Thus, the weapon of the offence was a gun and the death has been the result of the use of fire arm at vital parts like chest and the throat is established but the question arises as to who is the person liable for the commission of the offence. Even with regard to the gun which has been recovered, we find that the concerned police officer of the Dhrangadhra had certified on 27th May, 1988 before sending the gun to the Forensic Science Laboratory that if necessary, the gun may be broken. Its parts may be separated if at all it is necessary for the examination. This certificate was issued on 27th May, 1988 and the gun and other items of Muddamal were sent to the Forensic Science Laboratory. Exh. 42 at page 179 of

Paper Book shows that it was a single bore muzzle loading gun with length of 3.11 ft. The other items of muddamal are detailed out in Exh. 43. The gun and the other articles of muddamal which were sent to the Forensic Science Laboratory on 27/28th May, 1988 appear to have been received by the Forensic Science Laboratory on 2nd June, 1988. The report of the Senior Scientific Assistant of the Forensic Scientific Laboratory and from the Assistant Chemical Analyser i.e. Exh. 46 dated 2nd September, 1988 mentions it as a single barrel muzzle loading shot gun in working condition of about 78 cms. It was sent as Parcel - L. Parcel-J contained about eighty nine small spherical metallic shots totally weighing about 4 gms. Parcel-M contained one percussion cap weighing about 0.192 gm and having length of about 0.59 cm; twenty two big spherical metallic shots totally weighing about 22.5 gms; and two hundred small spherical metallic shots totally weighing about 11 gms. few shots were found slightly bigger in size and few shots were found irregular in shape as Exh.M1, M2 and M3 respectively. Parcel-N contained black powder weighing about 10 gms. Result of the examination shows that the gun was in working condition. It was loaded with gun powder from lab.stock in the laboratory and was successfully test fired in the laboratory by pulling and releasing the hammer (as hammer of the weapon was not remaining in cocked position). Residues of fired gun powder could be detected in the barrel washing (washing taken prior to its laboratory test firing) of Exh. L thereby showing that Exh. L has been used for firing prior to its receipt in the laboratory. It is also shown that the shots which were fired were iron shots and shots of Exh. M2 and M3 of parcel M were iron shots. Such shots can be used as projectiles in muzzle loading gun including Exh.L. The percussion cap was successfully tested, fired in the laboratory and was found live. Exh.N was the gun powder, some amount of which was taken and was tested in the laboratory and was fired and found live.Thus, this report Exh. 46 made by the Senior Scientific Assistant, FSL cum Assistant Chemical Examiner shows that the gun was in working condition and it was fired prior to its receipt in the laboratory but this result is also coupled with the observation that the hammer of the weapon was not remaining in cocked position and, therefore, for the purpose of testing in the laboratory, the method of pulling and releasing the hammer was applied. In this context, the reference may also be made to Exh. 45 and 47. Exh. 45 is the report made by the Senior Scientific Assistant, FSL at Junagadh which shows that the blood group of the blood soaked soil and what was present on the clothes was A-B blood group

of human blood at items No. 1 and 5 and 11 of Exh. 45 whereas blood group of the blood on the pellets could not be ascertained as per Exh. 47 i.e. as per the report by the Senior Scientific Assistant of the Forensic Scientific Laboratory at Ahmedabad.

12. We have also found from the record that an order was passed by the Sub Divisional Magistrate, Dhrangadhra on 12th October, 1988 on the application dated 20th May, 1988 which had been moved by the Police Sub Inspector, Dhrangadhra for cancellation of the licence of the gun in question. This document produced by the appellant-accused shows that the licence of the gun was renewed for the period upto 31st December, 1988. In this order dated 12th October, 1988, it has been mentioned that the trigger of the gun was not there. It was in the broken condition and even if it is repaired, it cannot be put in working condition. The Sub Divisional Magistrate, Dhrangadhra has cancelled the licence of the gun so that the weapon may not be misused in future. On that basis, it was argued by the learned counsel that the gun which was recovered from the accused was different gun than the one in respect of which the licence has been cancelled. There is no identification mark described with regard to the gun recovered and, therefore, it is not possible to say that the gun which was used for committing the offence was different than the one in respect of which this order has been passed, more particularly when the gun which was recovered has been subjected to successful test in the Forensic Scientific Laboratory. Nevertheless, if we take into consideration the report of the Laboratory Exh. 46 which shows that it was put to successful test and the contents of this order dated 12th October, 1988 passed by the Sub Divisional Magistrate at Dhrangadhra, it cannot be made out as to at what stage, the gun became unworkable and at what stage, it was broken or that the trigger was there or not. Besides this, the contents of the order dated 12th October, 1988 read with the contents of the Exh. 46 against the result of the examination at Exh. L mentioning at the end( as the hammer of the weapon was not remaining in cocked position) and that the test was performed in the laboratory by pulling and releasing the hammer leaves us to speculate as to what was the exact position of the weapon of offence on the date when the offence was committed, the date when the test was conducted in the laboratory on the basis of which the result has been given in Exh. 46 and on the date of application dated 20th May, 1988 as was moved by the PSI Dhrangadhra for cancellation of the licence of the gun [because the

application dated 20th May, 1988 moved by the PSI Dhrangadhra is not on record] and the date on which the order was passed by the Sub Divisional Magistrate, Dhrangadhra.

13. Considering all the evidence of the eye witnesses and the medical evidence and the evidence with regard to the recovery of the weapon brings us now to the plea of alibi taken by the accused and the two defence witnesses who have been examined by the accused in defence. The learned counsel has also made reference to the statement of the accused under section 313 of the Code of Criminal Procedure, 1973. The cause list of 17th May, 1988 Exh. 61 shows that the case in which the appellant accused was present at Dhrangadhra was at serial No. 64 in the Dhrangadhra Court and the entry against this case at No.64 also shows that the appellant accused Natubhai Bhudarbhai was present in the Court at Dhrangadhra on that day i.e. 17th May, 1988. From the copy of the order sheet relating to the case in which the appellant-accused was present in the Court at Dhrangadhra, it appears that on 17th May, 1988, the appellant-accused was present in the Court at Dhrangadhra with his lawyer and on this date, two witnesses were also examined. The Court clerk DW-1 has deposed at Exh. 67 that the adjustment of the cases in the Board takes time upto 1.00 to 1.30 pm and, thereafter, the cases are taken up serialwise. In the cross-examination of this witness, DW-1, a suggestion to the effect that the accused Natubhai Bhudarbhai used to come on motor cycle has been made but the witness says that he does not know it. This witness has also said in his cross examination that in the cases of prohibition, if the witness turned hostile, evidence may be over in two to five minutes. DW-2 Traffic Controller of Dhrangadhra has given the distance and the timings of the Buses. According to him, there is only one bus which leave Dhrangadhra in the morning at about 8.50 which is available for village Devcharadi and on the same night, the bus comes from Devcharadi to Dhrangadhra. The terminals of the buses are at Dhrangadhra and at Surendnranagar. If a person has to go to Devcharadi from Dhrangadhra, normal route is Gujarwadi-Prangadh and Devcharadi. Gujarwadi is about 28 km away from Dhrangadhra and Devcharadi is about 32 km away from Dhrangadhra. This witness has also stated that there is also a bus at 2 o'clock in the afternoon from Dhrangadhra to Gujarwadi. According to this witness, the distance between Gujarwadi and Prangadh is 10 km and there is distance of about 5 to 6 km between Prangadh and Devcharadi. He has stated that on 17th May, 1988, on the

basis of the register, only one bus had gone from Dhrangadhra to Devcharadi via Prangadh. The bus which leaves Dhrangadhra for Gujarwadi in the afternoon at 2.00 o'clock goes through Khamijada Road and on this route, the bus had departed at 2.00 o'clock. He has also stated that this bus carries passengers of Devcharadi and Devcharadi is at the distance of 2.00 km from the stop and there is no pakka road (Dhori Marg) around Devcharadi. Thus, in support of his plea of alibi, the defence evidence which has come on record makes it clear that the appellant - accused was present in the Court on 17th May, 1988 at Dhrangadhra but it cananot be said with certainty as to whether the case in which the appellant-accused had appeared in the Court at Dhrangadhra was over at such a point of time so as to enable him to reach Devcharadi by 6.30 p.m. or not. In the facts and circumstances of this case, when the case was listed at item No. 64 and two witnesses were examined and as per the oral testimony of the Court Clerk, after the adjustment of the cases in the Board which takes about 1.30 p.m., thereafter, normally, there is a break and, therefore, the case may have been taken up in the second sitting of the day and we are again left to speculate as to whether the case was taken up immediately or not and in fact, how much was the time taken in the proceedings and at what time, the appellant accused left Dhrangadhra. When the case was listed at Sr.No.64 in the cause list of that day and it was not simply adjourned but two witnesses were examined, may be that the appellant accused had left early and may be that he left at such a time when he could not reach the place of occurrence at 6.30 p.m. because as per the evidence of DW-2, traffic controller, there was no bus available for reaching Devcharadi even via Gujarwadi after two o'clock. The Public Prosecutor though made a suggestion to the DW-1 that the appellant had come to attend the Court on that date in the Court at Dhrangadhra by Motor cycle but it appears that the suggestion was made for just an attempt to suggest that the appellant had come on motor cycle. No prosecution witness has said that the appellant had gone there on motor cycle and the police has not made any investigation in this regard as to how the appellant used to go to attend the case at Dhrangadhra Court; if he had used motor cycle, whose motor cycle it was and what was the number of the motor and in these circumstances, even if it is assumed that the proceedings in the case at Dhrangadhra Court may have taken little short time, it is not possible to say the exact time of his departure from Dhrangadhra and his arrival at Devcharadi on 17th May, 1988.

14. It is, of course, true that the suggestion with regard to the absence of the appellant accused at the time of commission of offence has not been made to any witnesses other than PW-2 but the suggestion with regard to his absence has been made to PW-2 though it has been denied. Thus, it cannot be said that it is a case in which the defence was not at all suggested to the prosecution witnesses.

15. Having considered various aspects of the evidence as aforesaid, we notice the following points which raise suspicion and reasonable doubt against the correctness of the story of the prosecution:

- (1) The deceased Talsi Gangaram had gone to the spot not as a matter of routine but on that particular day, as a mere chance when he noticed that his son had not returned from the cattle camp. Nothing has come on record to show that the fact that the deceased would be going from village Devcharadi towards Prangadh to take his son on that particular day at that particular point of time was known to the accused person and that he will be available there so that they may take an opportunity to kill him and for that purpose, they may go there with the fire arm.
- (2) Unnatural conduct of the eye witnesses in not disclosing the incident to anyone while going from the spot and the absence of any witnesses from the villagers to whom the incident could have been disclosed or the names of the appellants may have been disclosed.
- (3) The conduct of the three eye witnesses PW1, PW3 and PW4 in leaving the spot immediately after the happening of incident while the body of the deceased was left with his minor son who was only 13 to 14 years old.
- (4) Nondisclosure of the names of important eye witness namely Shankar Pala in the FIR filed by the complainant.
- (5) Condition of the weapon of the offence as per the

report of the Laboratory and as has been mentioned in the order for cancelling the licence to which the reference has already been made in detail hereinabove.

(6) Presence of the appellant accused in the Dhrangadhra Court on 17th May, 1988 and the means of transportation for coming to Devcharadi from Dhrangadhra in the facts of the case show that the appellant accused may or may not have been able to reach the scene of offence at 6.30 pm while the appellant-accused claims that he reached Devcharadi at night hours of that day. The Investigating Officer did not reach the eye witness Shankar Pala and Bhikha Lalji i.e. PW 3 and PW 4 on the very night of 17th May, 1988 though both of them were very much available. They were important eye witnesses and in any case, the Investigating Officer ought to have reached them to record their statements immediately but their statements have been recorded by the police as per the Investigating Officer after preparing the panchahama of the scene of occurrence on 18th May, 1988.

(7) The Investigating Officer has stated that although Mahadev Valjibhai i.e. PW 1 had come with Investigating Officer to Devcharadi, he did not ask him about the other witnesses till the morning and no efforts were made by him in this regard. The investigating Officer did not go to Harijan vas on 17.5.1988 for the witness Shankar Pala and Bhikha Lalji. The Investigating Officer also says that the name of Shankar Pala was not with him as a witness before the statement of Shankar Pala was recorded and that Narottam Talsi had not given out to him that Shankar Pala and Bhikha Laljai i.e. PW 3 and PW 4 were present on the spot at the time of commission of the offence.

(8) The Investigating Officer has also disclosed in his cross-examination that Shankar Pala had not given out in his statement that Bhikha Lalji was present on the spot.

(9) The panchanama of the scene of occurrence Exh. 28 shows that not a single pellet was recovered

from the spot by the police. Even if the gun was fired from a short distance, considering several pellets in to the body of the deceased, few pellets must have fallen down on the ground but no pellet has been recovered.

16. The aforesaid facts and circumstances do raise a suspicion against the correctness of the prosecution story and, therefore, it is a case in which the prosecution cannot be said to have proved the offence to the hilt that the appellant-accused and none else has committed the offence and, therefore, the appellant-accused is entitled to the benefit of doubt. On the basis of the discussion and adjudication as aforesaid and on a critical analysis of the evidence, we do not find it safe to uphold the conviction and while granting benefit of doubt to the appellant-accused, we hereby set aside the conviction of the appellant-accused for the offence under section 302 of the Indian Penal Code as well as under section 25 (1) (c) of the Arms Act and section 135 of the Bombay Police Act. The appeal against conviction and sentence accordingly succeeds and conviction as well as sentence are hereby set aside and it is ordered that the appellant-accused Koli Natubhai Bhudarbhai be released forthwith if not required in any other case.

17. So far as criminal appeal against the acquittal is concerned, we find that the Sessions Judge has acquitted the respondent-accused Bhudar Mohan on the ground that he had simply passed on the gun to his son Natubhai Bhudarbhai and did not play any active part or role in the commission of the actual offence and, therefore, the learned Sessions Judge rest contended by convicting Bhudar Mohan under section 25(1)(c) of the Arms Act and Section 135 of the Bombay Police Act. There is no appeal before us by Bhudar Mohan against his conviction under section 25(1)(c) of the Arms Act and section 135 of the Bombay Police Act but while deciding criminal appeal No. 849 of 1989 as aforesaid, the appellant-accused Natubhai Bhudarbhai against whom allegation was that he had fired the gun has been acquitted by giving benefit of doubt and, therefore, there is no question of now considering the question of even abetment of the offence against the respondent Bhudar Mohan and we find that there is nothing wrong with the acquittal of Bhudar Mohan and consequently, appeal against acquittal of Bhudar Mohan for the offence under section 302 of the Indian Penal Code fails and the same

is hereby dismissed.

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Vyas